Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1994

CRISTINA GUTIERREZ, ESQUIRE,

*Petitioner,*

v.

STATE OF MARYLAND,

*Respondent.*

## Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

## PETITION FOR WRIT OF CERTIORARI

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62 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals of Maryland, in *In Re Criminal Investigation No. 1/296X*, 336 Md. 1, 646 A.2d 389 (1994), incorrectly held that the attorney-client privilege does not shield records of attorney's fees from a grand jury subpoena *duces tecum*.

2. Whether the Court of Appeals of Maryland, in *In Re Criminal Investigation No. 1/296X*, 336 Md. 1, 646 A.2d 389 (1994), incorrectly ruled that the Sixth Amendment does not shield records of attorney's fees from a grand jury subpoena *duces tecum*.

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## REFERENCE TO OPINIONS DELIVERED

1. *In Re A Special Investigation,* Misc. 1/296X (Circuit Ct. for Anne Arundel County Oct. 8, 1993), *reconsideration den'd,* Misc. 1-296X (Circuit Ct. for Anne Arundel County Oct. 27, 1993)

2. *In Re Criminal Investigation No. 1/296X,* 336 Md. 1, 646 A.2d 389 (1994)

## STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Court of Appeals of Maryland entered judgment in favor of the State of Maryland on August 25, 1994 in *In Re Criminal Investigation No. 1/296X,* 336 Md. 1, 646 A.2d 389 (1994). The United States Supreme Court has jurisdiction to review this judgment under 28 U.S.C. § 1257, which states in part, "[f]inal judgments . . . rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is . . . claimed under the Constitution or statues of . . . the United States." In the present case, a "right, privilege or immunity" is claimed under the Sixth Amendment of the United States Constitution.

## CONSTITUTIONAL PROVISIONS INVOLVED

### *SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION*

**In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,**

> which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

## I. STATEMENT OF THE CASE

Petitioner, Maria Cristina Gutierrez ("Ms. Gutierrez"), is a Maryland attorney. (App. 5.) She represents R.W. in three criminal matters in Maryland: a narcotics case, a forfeiture case, and a tax investigation. (App. 5-6.)

Subsequent to R.W.'s retention of Gutierrez in all three legal matters, the Grand Jury for Anne Arundel County, as part of its tax investigation of R.W., issued a subpoena for Gutierrez to "appear" and "produce any and all records reflecting payment for legal services rendered to or on behalf of R.W. for the time period January 1, 1990 to the present." (App. 1.) Gutierrez moved to quash the subpoena in the Circuit Court for Anne Arundel County, Maryland ("Circuit Court"). (App. 4.)

The Circuit Court heard the motion on October 5, 1993. (App. 9.) At the hearing, counsel for Ms. Gutierrez, cited, *inter alia*, the Sixth Amendment of the United States and the closely related attorney-client privilege as the basis for its motion, and used the Sixth Amendment to distinguish a prior case concerning subpoenaed attorney-client fee records of former clients. (App. 9.) The Court issued a Memorandum Opinion and Order on October 8, 1993, "stay[ing] the enforcement of the subpoena until Ms. Gutierrez's representation of her client has terminated." (App. 19-21.) As its basis, the Court agreed with

counsel for Ms. Gutierrez, noting that "the possible chilling effect such disclosure could have on a [client's] ability to openly seek his attorney's legal advice would be great." (App. 20.) In an October 27, 1993 Order, the Circuit Court denied Appellant's subsequent Motion for Reconsideration. (App. 22.)

On November 3, 1993 the State of Maryland filed a Notice of Appeal in the Court of Special Appeals of Maryland from both the Circuit Court's Memorandum Opinion and Order of October 8, 1993, and the Circuit Court's Order of October 27, 1993. On December 10, 1993, the Court of Appeals of Maryland, *sua sponte*, issued a writ of certiorari to the Court of Special Appeals, and transferred the appeal to its docket.

On August 25, 1994, the Court of Appeals of Maryland reversed the Circuit Court's Order, holding that neither the Sixth Amendment, nor the attorney-client privilege, shields an attorney from a subpoena *duces tecum* to produce fee records of a current client. (App. 23-41.)

## REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

### A. SUMMARY OF ARGUMENT

The State of Maryland seeks fee payment records from an attorney in an investigation of the very matter for which that attorney was retained. If such disclosure is compelled, the effect upon the attorney-client relationship would be disastrous. Such production would have a

chilling effect on the formation of the attorney-client relationship, and the communications which occur in such a relationship. Furthermore, such production would cause clients to lose trust in their attorney's dedication to their cause. As a result, the United States Supreme Court should hold that the attorney-client privilege encompasses attorney fee payment records.

Furthermore, because Ms. Gutierrez is a medium between her client and the prosecutorial forces of organized society, the Sixth Amendment also mandates that disclosure of such records not be compelled by the State of Maryland. Such disclosure would create a conflict, actual or otherwise, between Ms. Gutierrez and R.W., and thus deprive R.W. of his right to counsel.

## B. ARGUMENT

> The practice of law is more than a mere trade or business, and . . . those who engage in it are the guardians of ideals and traditions to which it is right that they should from time to time dedicate themselves anew.

Hugh Patterson MacMillan, "The Ethics of Advocacy," (1916)

### 1. The attorney-client privilege shields records of attorney's fees from a grand jury subpoena duces tecum.

#### a. The Court of Appeals of Maryland did not decide this issue upon independent and adequate State grounds.

The United States Supreme Court has jurisdiction to review final State court judgments under 28 U.S.C.

§ 1257, which states in part, "[f]inal judgments . . . rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is . . . claimed under the Constitution or statues of . . . the United States." In addition, Rule 10 of the Supreme Court Rules states that a "special and important reason" for Supreme Court review occurs "[w]hen a State court . . . has decided an important question of federal law which has not been, but should be settled by this Court." The issue of State-compelled production of attorney fee payment records is a question of federal law which has never been addressed by the United States Supreme Court.

At least one commentator has urged that the United States Supreme Court should review State court decisions on matters that *technically* rest on State law, but *in fact* are determined by the voluntary incorporation of federal law by reference. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 Ga.L.Rev. 861 (1985). Indeed, the United States Supreme Court has decided that if "a State court decision fairly appears to . . . be interwoven with the federal law, and when the adequacy and independence of any possible State ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the State court decided the case the way it did because it believed that federal law required it do so." *Michigan v. Long*, 103 S.Ct. 3469, 3474-3478 (1983).

Such is the case here. The Court of Appeals of Maryland noted below, that the attorney-client privilege has a

"close relationship with the constitutional rights pertaining to the effective assistance of counsel." *In Re Criminal Investigation No. 1/296X*, 336 Md. 1, 646 A.2d 389, 291 (1994). Indeed, "while never given an explicit constitutional underpinning, the privilege is, nevertheless, closely tied to the federal . . . constitutional guarantees of effective assistance of counsel, and could, if limited too severely, make these basis guarantees virtually meaningless. *Id.* (quoting *State v. Pratt*, 284 Md. 515, 520, 398 A.2d 421, 423 (1979)). In fact, the Court of Appeals, went on to cite case law from the federal circuit courts for the foundation of its holding.[1] Although the Court of Appeals also relied on *In Re Criminal Investigation No. 1/242Q*, 326 Md. 1, 602 A.2d 1220 (1992), this was solely because the current case is "fundamentally an extension of [that] holding." *In Re Criminal Investigation 1/296X*, 646 A.2d at 391. However, *In Re Criminal Investigation No. 1/242Q* also relied overwhelmingly on federal case law. *Id.* at 1222-1223.

Therefore, the United States Supreme Court has jurisdiction to review this case.

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[1] The Court of Appeals cited the following federal cases: *In Re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238 (2d Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); *In Re Osterhoudt*, 722 F.2d 591 (9th Cir. 1983); *In Re Grand Jury Matter*, 926 F.2d 348 (4th Cir. 1991); *In Re Grand Jury Subpenas Duces Tecum (Marger/Merenbach)*, 695 F.2d 363 (9th Cir. 1982); *United States v. Ricks*, 776 F.2d 455 (4th Cir. 1985).

**b. The attorney-client privilege protects fee payment information.**

Although the majority of courts have ruled that the attorney-client privilege does not encompass attorney fee payment records, these courts, including the Court of Appeals of Maryland, have failed to provide a reasoned basis upon which to justify that proposition as a matter either of reason or definition. Steven Goode, *Identity, Fees, and the Attorney-Client Privilege*, 59 Geo.Wash.L.Rev. 307, 321-22 (1991). As pointed out by Professor Goode, the justification for the rule is found "in the oft-stated hornbook rule that the identity of a client is ordinarily not privileged." *Id.* This rule, however, is *not* based on an analysis of attorney fee payment records, and does *not* consider the effect the rule has on the attorney-client relationship.

The constitutional rights protected by the attorney-client privilege are unmistakable, and are realized even by the Court of Appeals of Maryland:

> The attorney-client privilege is basic to a relation of trust and confidence that, though not given express constitutional security, is nonetheless *essentially interrelated* with the specific *constitutional guaranties* of the individual's *right to counsel* and *immunity from self-incrimination*, the oldest of privileges for confidential communications . . .
>
> The essential policy of the privilege is grounded in the subjective consideration of the client's freedom from apprehension in consulting his legal advisor, assured by removing the risk of

> disclosure by the attorney *even at the hands of the law.*

*Harrison v. State*, 276 Md. 122, 133-34, 345 A.2d 830, 837 (1975). If attorneys were compelled to surrender fee payment records, the effect on the attorney-client relationship and these unmistakable rights would be disastrous:

> If the attorney is forced to give information detrimental to his client's interest, the attorney-client relationship will only suffer. In the long run, there will be a detrimental chilling effect on the attorney, especially the criminal defense attorney who is put in the untenable position of having to face disqualification for giving evidence against the client. Indeed, the chilling effect will run even to the formation of the attorney-client relationship: what client will seek advice if the very asking of that advice can be used against him?

Daniel J. Capra, *Deterring the Formation of the Attorney-Client Relationship: Disclosure of Client Identity, Payment of Fees, and Communications by Fiduciaries*, 4 Geo. J. Legal Ethics 235, 237 (1990). Indeed, "it is safe to assume that, where [clients] have thought about it, not one of them would expect that his or her fee arrangement would easily be revealed even to the government." *In Re Criminal Investigation No. 1/242Q*, 602 A.2d 120, 1228 (1992) (Bell dissenting). With the realization that information provided to an attorney could be used against them in a court of law, clients will reconsider hiring an attorney, and will certainly reconsider *what they tell their attorney.*[2]

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[2] Perhaps attorneys will now have to "Mirandize" their clients prior to the initial client interview by instructing their

Compelling the production of attorney fee records would also destroy the expectant duty of loyalty owed by the attorney in the relationship. The constitutional right to counsel, under the Sixth Amendment of the United States Constitution includes the right to have counsel's representation free from conflicts of interest. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). This is because providing such information will detract from the criminal defense's attorney's duty of loyalty to her client. "Loyalty is an essential element in the lawyer's relationship to a client. . . . Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents. . . . " ABA Model Rule of Prof. Conduct 1.7, cmt. (1994); *see also Strickland v. Washington*, 466 U.S. 688, 692 (1984) (calling the duty of loyalty "perhaps the most basic of counsel's duties").

Thus, due to the chilling effect on the attorney-client relationship, and the client's resultant loss of confidence in his attorney's loyalty, the impact on the attorney-client relationship will be considerable. Indeed, at stake is an "individual's right to spend his own money to obtain the advice and assistance of counsel." *Caplin & Drysdale v. United States*, 491 U.S. 617, 626 (1989).

Here, an attorney has been served with a subpoena *duces tecum* to produce fee payment records of a *current* client whom she represents in the *actual tax investigation* in which the subpoena was issued. Therefore, Ms. Gutierrez is being compelled to produce evidence against her

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**clients that their attorney may have to testify against them in a court of law in the *very case* for which the client is seeking representation.**

client in the very investigation in which she represents him. Ms. Gutierrez's duty of loyalty to R.W. is directly interfered with by the State.

Instead of acting as an advocate on R.W.'s behalf, Ms. Gutierrez is forced to assist the government in manufacturing a case *against* R.W – the actual case in which R.W. sought Ms. Gutierrez's advice. This is in spite of the fact that "the defendant has a right to compel the State to investigate its own case, find its own evidence, and prove its own facts." *United v. Wright*, 489 F.2d 1181, 1195 (D.C. Cir. 1973). Ms. Gutierrez is compelled to be disloyal to the very cause she is retained by R.W. to uphold. "There is something very unseemly and repugnant, not to mention inappropriate, about permitting the State to maintain a prosecution on this basis and there is also something very wrong with implicating counsel in it." *In Re Criminal Investigation No. 1/242Q*, 602 A.2d 120, 1230 (1992) (Bell dissenting).

Thus, fee payments should be seen as an integral part of, and not just collateral to, the on-going attorney-client relationship. In addition, this Court must realize that the disclosure of such records will have a deterrent effect on the *communications* which occur during that relationship, and the formation of the relationship itself. Thus, this Court should rule that the attorney-client privilege encompasses fee payment records.

In the alternative, if this Court adopts the rule that the attorney-client privilege does not encompass fee payment records, then the "legal advice" exception to this rule should apply to this case. This exception applies when "disclosure of the information would implicate the

client in the very matter for which legal advice was sought in the first case." *In Re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, 695 F.2d 363, 365 (9th Cir. 1982).

Given the above articulated policies underlying the attorney-client privilege for current clients, including its interrelatedness with the duty of loyalty and the right to counsel, the United States Supreme Court should adopt this exception. Such a holding would encourage those faced with the prosecutorial forces of organized society to seek legal assistance in order to properly uphold their constitutional rights, by maintaining the "trust and confidence" which is intrinsic to the revered relationship of attorney and client.

Such a holding would not be overbroad. Indeed, the United States Court of Appeals for the Tenth Circuit has taken great pains to point out that in order for the exception to apply, (1) the person seeking legal advice must be the client of the attorney involved, and (2) the client must seek legal advice about the very activity for which information is sought. *In Re Grand Jury Subpoenas*, 906 F.2d 1485, 1489 (10th Cir. 1990).

If the "legal advice" exception is adopted, Ms. Gutierrez's situation would fall squarely within the exception. First, R.W. is the client of the attorney involved (Gutierrez). Second, R.W. sought legal advice about the very activity for which information was sought (he sought tax advice prior to the subpoena by the Grand Jury, which was doing a tax investigation of R.W.).

Finally, the disclosure would implicate R.W. in the tax investigation. This will occur in three different ways.

First, "it permits an inference to be drawn as to . . . [R.W.'s] motivation (e.g. guilty knowledge) for consulting counsel." *In Re Sealed Case*, 877 F.2d 976, 979 (D.C. Cir. 1989). Second, it may tend to indicate that R.W. has a larger net worth than he reported, thereby implicating him in the crime of tax evasion. Third, if billing sheets are disclosed, the State may be able to probe deeply into the nature of Gutierrez's representation of R.W. on the tax matter (what matters were researched; the number of times Gutierrez and R.W. have consulted, etc.).

Therefore, since all elements of the exception have been met, the facts of this case fall within the legal advice exception, which should be adopted by this Honorable Court.

### 2. The Sixth Amendment shields records of attorney's fees from a grand jury subpoena *duces tecum*.

Although there is no right to counsel during a criminal investigation, *Moran v. Burbine*, 475 U.S. 412, 427 (1986), the subpoena *duces tecum* at issue in the instant case requires the production of "any and all records reflecting payments made for legal services rendered to or on behalf of R.W. for the time period January 1, 1990 to the present." (E. 5). This clearly includes the fee payment records in two cases where the "initiation of formal charges" has begun (the narcotics and forfeiture cases). *Moran*, 475 U.S. at 427 (the right to counsel attaches at the initiation of formal proceedings). Therefore, R.W.'s right to counsel under the Sixth Amendment to the United

States Constitution is at issue since Ms. Gutierrez is currently a medium between R.W. and the "prosecutorial forces of organized society." *Maine v. Moulton*, 474 U.S. 159, 170 (1985).

In addition, R.W. "has a *substantial interest* in continuing to receive the assistance of counsel he has already retained for purpose of the grand jury investigation." *In Re Special Grand Jury No. 81-1*, 676 F.2d 1005, 1010 (4th Cir. 1982) (emphasis added). As pointed out by this Court in *Patterson v. Illinois*, 101 487 U.S. 285, 290 n. 3 (1988), "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect."

While some courts have held that the Sixth Amendment is only violated "if furnishing the information would create an actual conflict between a client and the attorney who is representing that client," *In Re Grand Jury Subpoena For Reyes-Requena*, 913 F.2d 1118, 1130 (5th Cir. 1990), a conflict, actual or otherwise, will occur in the instant case if Ms. Gutierrez is compelled to disclose fee payment records which may incriminate her client. Indeed, "a special conflict confronts attorneys who are or ought to be called as witnesses in a litigation in which they represent one of the parties." Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 240 (3d ed., Little, Brown and Co. 1992). "Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Since "[l]oyalty is an essential element in the lawyer's relationship to a client. . . . a lawyer may ordinarily not act as advocate against a person the lawyer represents. . . . "

ABA Model Rule of Prof. Conduct 1.7, cmt. (1993).[3] However, this will be the exact scenario if Gutierrez presents evidence against her client. Indeed, R.W. may understandably decide to go *pro se* in order to avoid having every new attorney he retains present evidence against him.

Such conflict still results if Ms. Gutierrez were to choose from the list of "reasonable alternatives" to testifying suggested by the Court of Appeals, such as using stipulations or having a bookkeeper authenticate the attorney fee payment records. *In Re Criminal Investigation No. 1/296X*, 646 A.2d at 395 (1994). Most obviously, many criminal defense attorney's do not have a bookkeeper on staff. Many attorneys are their *own* bookkeepers. Does the Court of Appeals realistically suggest that the Court of Appeals create a different set of rules depending upon the existence of a firm bookkeeper? As for the stipulation, there is little if any practical difference between an attorney "testifying" about fee payment records and an attorney "stipulating" that the fee payment records are authentic and belong to the client. The State-compelled violation of the attorney's duties of loyalty and diligence produce a conflict, "actual" or otherwise, regardless of

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[3] Although the Court of Appeals cites ABA Model Rule of Prof. Conduct 3.7, which permits an attorney to testify and still represent a client where the testimony relates to the nature and value of legal services rendered, *In Re Criminal Investigation No. 1/296X*, 646 A.2d at 396, this rule "runs only to advocacy at trial, not to pre-trial work." Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 241 (3d ed. Little, Brown and Co. 1992) (citing ABA Informal Opinion 89-1529 as being in accord).

*how* the attorney is compelled to deliver the blow to her client.

The United States Supreme Court should recognize that an attorney's services are different from a car, a house, or jewelry. Unlike the relationship between a purchaser of a car and a car salesman, or between a buyer of a house and a realtor, R.W. is currently paying Ms. Gutierrez for a confidential relationship which is the very essence of trust, and which demands Gutierrez's vigorous representation of R.W. Unlike a car salesman or a realtor, Ms. Gutierrez takes an oath to effectively and loyally represent her client. In fact, as part of the oath to become a member of the United States District Court for the District of Maryland, attorneys pledge an oath of secrecy.

Therefore, given the actual conflict resulting from Gutierrez acting as a witness against her own client, enforcement of the subpoena *duces tecum* in this matter would deny R.W.'s right to have an attorney who is free from conflicts of interests. Accordingly, said enforcement would violate R.W.'s right to counsel under the Sixth Amendment of the United States Constitution.

As a result, the United States Supreme Court should issue a writ of certiorari to the Court of Appeals of Maryland and hold that the rule of law adopted in *In Re Criminal Investigation No. 1/296X*, 646 A.2d 389, 395 (1994) is inconsistent with the Sixth Amendment to the United States Constitution.

## CONCLUSION

For the foregoing reasons, the petitioner respectfully requests this Honorable Court to grant Petitioner's petition for writ of certiorari.

Respectfully submitted,

FRED R. JOSEPH
JOSEPH, GREENWALD & LAAKE, P.A.

| | | |
|---|---|---|
| IN RE: | : | IN THE CIRCUIT |
| A. | : | COURT |
| SPECIAL INVESTIGATION | : | FOR |
| | : | ANNE ARUNDEL |
| | : | COUNTY |

SUBPOENA DUCES TECUM

To: William H. Murphy, Jr., Esquire
M. Cristina Gutierrez, Esquire
Law Offices of William H. Murphy, Jr. & Associates, P.A.
1007 N. Calvert Street
Baltimore, Maryland 21202

You are hereby summoned and commanded to appear before the Grand Jury for Anne Arundel County, Courthouse, Church Circle, Annapolis, Maryland on Monday, September 27, 1993 at 10:00 a.m. and to produce any and all records reflecting payments made for legal services rendered to or on behalf of R W for the time period January 1, 1990 to the present.

Date Issued: 8/23/93

/s/ Mary M. Rose
Clerk
Circuit Court for
Anne Arundel County

[SEAL]

For questions concerning this Subpoena, please contact:

Carolyn H. Henneman CHH
Assistant Attorney General
Criminal Investigations Division
200 St. Paul Place, 18th Floor
Baltimore, Maryland 21202
410/576-6380

070-0007-93

TRUE COPY,

TEST: Mary McNally Rose, Clerk

By: /s/ Illegible Deputy

| | | |
|---|---|---|
| IN RE: | * | IN THE CIRCUIT COURT |
| | * | FOR ANNE ARUNDEL |
| | * | COUNTY MARYLAND |
| A SPECIAL INVESTIGATION | * | MISC. 1/296X |
| | * | |

**********

MOTION TO QUASH GRAND JURY SUBPOENA DUCES TECUM

HEARD IN OPEN COURT

BEFORE THE

HONORABLE BRUCE C. WILLIAMS

OCTOBER 5, 1993

PRESENT:

CAROLYN H. HENNEMAN, ESQUIRE, ASSISTANT ATTORNEY GENERAL FOR THE STATE OF MARYLAND

FRED R. JOSEPH, ESQUIRE, COUNSEL FOR M. CRISTINA QUTIERREZ [sic]

NANCY BAKER, DEPUTY COURTROOM CLERK

KATHLEEN M. HIGGINS, OFFICIAL COURT REPORTER

[p. 1-1] PROCEEDINGS

OCTOBER 5, 1993

1:34 P.M.

THE COURT: Good afternoon. All right, in the Matter of Cristine Gutierrez.

MS. HENNEMAN: Your Honor, we call *In Re: A Special Investigation*, Miscellaneous 1 slash 296X. Carolyn

Henneman for the State and the Anne Arundel County Grand Jury. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. JOSEPH: Good afternoon, your Honor. Fred R. – Fred R. Joseph, Counsel for Ms. Gutierrez.

THE COURT: Okay. Well, it's your Motion to Quash.

MR. JOSEPH: Thank you, Your Honor. Your Honor, uhm, we have a filed a, uh, Motion to Quash the, uh, subpoena deucus [sic] tecum in this case; and, uh, your Honor has, uh, uh, stepped forward once before in this area and, uh, dispite [sic] –

THE COURT: Been squashed.

MR. JOSEPH: Despite – despite the correct decision that Your Honor made, Your Honor's not yet on the Court of Appeals, and thus Judge –

THE COURT: And never aspire to be either.

MR. JOSEPH: Uh, the Court of Appeals, uh, came down with the decision that we have all read. Uh, it our position that this case involved Ms. Gutierrez is outside the [p. 1-2] parameters of that unfortunate case that we all have to deal with. In that regard, with the Court's permission, I would, uh, ask to permit Ms. Gutierrez to very briefly testify, uh, so that –

THE COURT: Okay.

MR. JOSEPH: – the record is clear.

*MARIA CHRISTINA GUTIERREZ*, the Respondent, called as a witness in her own behalf, having been first duly sworn, testified as follows:

THE CLERK: You may be seated. Please state your name and occupation.

THE WITNESS: Maria Cristina Gutierrez, G-U-T-I-E-R-R-E-Z. Professional address, 1007 North Calvert Street, Baltimore, Maryland 21202.

DIRECT EXAMINATION

BY MR. JOSEPH:

Q Ms. Gutierrez, uh, would you state for the Court your professional employment?

A Uh, I'm a partner in the firm of Murphy and Gutierrez, uh, P.A., located at 1007 North Calvert Street. I am a criminal defense lawyer.

Q And you are the, uh, uh, you received a subpoena deucus tecum, is that correct?

A Yes, I did.

Q Uh –

[p. 1-3] A I agreed to accept service by mail.

Q Now, would you, uh, provide the Court with, uh, your description of, uh, what your representation was and is on behalf of Mr. Williams?

A I was initially, uh, retained by Rashad Williams, uh, in regard to his, uh, C.D.S. charges in Anne Arundel County, and in regard to whatever came as a result of a

search and seizure warrant execution on four different properties that he owned in four different jurisdictions, Howard County, Baltimore City, Anne Arundel County, and I believe, Baltimore County. I was also retained to represent him in regard to forfeiture actions, both state and federal, regarding monies and properties seized as a result of those search and seizure warrants. Subsequently I was retained by him in regard to, uh, what he believed to be an investigation by the Grand Jury of Anne Arundel County, uh, when he was served with subpoenas, or copies of subpoenas that had been served on various banks, I believe there were four separate banks, uh, for records of accounts with his name on them, although they were not solely his accounts.

Q Now, with reference to the search and seizure warrants, was there a subsequent indictment on him?

A There was an indictment in – in Anne Arundel County in the circuit court. I don't have the number. I – I think I gave your cases –

[p. 1-4] Q Is that case still pending?

A Yes, it is.

Q Okay. And with reference to the forfeiture, uh, is that case still pending?

A That case is still pending, uh, by agreement of both Mr. Ottey from the Attorney General's Office who pursues forfeiture on behalf of the state, and, uh, I don't recall the Assistant United States Attorney pursuing forfei- ture [sic] on behalf of the United States Government. Both of those cases will await resolution of his – of

the criminal case here in the circuit court. Related forfeitures actions against other persons, uh, not indicted and not related in the search and seizure warrant, but whose names appeared on the bank accounts, those forfeitures have been resolved.

Q Now, with reference to the, uh, matters pertaining to his financial situation and the subpoenas for his bank accounts, are those cases resolved?

A Those cases are not resolved.

Q And with reference to each and all of the cases that we have just discussed with the Court, uh, are those matters presently pending?

A Yes, they are.

Q And are you, uh, counsel for –

A I am the sole counsel of record for Mr. Williams.

MR. JOSEPH: That's all I have.

[p. 1-5] MS. HENNEMAN: No questions, your Honor.

THE COURT: Thank you. You may step down.

THE WITNESS: Thank you.

MR. JOSEPH: Your Honor, the only other, uh, document or testimony that we would ask the Court to consider for whatever weight it determs – determines appropriate, I have provided a copy of – of a letter that was FAXed to me last evening addressed to Your Honor from the, uh, President of the Maryland Criminal Defense Attorney's Association indicating, uh, the concern of the

Association, uh, with, uh, what is going on here in this courtroom. If I may provide the Court with a copy of that?

THE COURT: Okay.

MR. JOSEPH: May I approach, Your Honor?

THE COURT: Yes, indeed.

(Whereupon, Mr. Joseph approaches the Bench, and hands the Court a document.)

(Long pause)

THE COURT: Okay.

MR. JOSEPH: Your Honor, uh, with reference – with reference to argument on this matter, uh, the Court is, uh, familiar with, uh, *In Re: Criminal Investigation*, Number 1/242Q, 322 – 326 Maryland 1. Uh, it our position that with reference to Ms. Gutierrez' situation, what brings her, uh, case outside the parameters of this matter is the fact that, [p. 1-6] uh, Ms. Gutierrez, pursuant to her testimony here today, presently represents the individual in question, and not only represents that individual in question in the actual criminal case, but does as well represent, uh, Mr. Williams with reference to the forfeiture, and with, uh, reference to the subpoena of his, uh, uh, uh, status from financial institutions, and that this goes to the very heart of – of the exceptions that Judge Chasanow speaks of in – in his – in his decision.

Now, uh, Judge Bell, in his dissent, and I – I don't always enjoy speaking to the issue by referring to the dissent, Judge, uh, Judge Bell, anticipating this case in his dissent, in his footnote, points out that – that as he

reads it, uh, the majority opinion actually would discourage, uh, an investigation such as the present investigation, where the attorney was representing the client.

Uh, Judge Bell, as Ms. Henneman points out in her memorandum, goes on to state that in his opinion there is no great difference, but then again he supports the position that, uh, there was no right to have such a subpoena in the first place. Uh, I believe on behalf of Ms. Gutierrez that there is a dif – difference.

And one of the major aspects of that difference is the Sixth Amendment. That is where Ms. Gutierrez presently represents this individual in the criminal case, represents [p. 1-7] him in the forfeiture case, and represents him with reference to his financial situation, and the investigation by the Attorney General's Office. We have a relationship that will clearly be destroyed where the information obtained from Ms. Gutierrez will be a link, and conceivably that last link, in the investigation to show, uh, perhaps criminal, uh, criminal tax violations by Mr. Williams.

I don't think it's speculat – speculative to – to indicate that where the government, as it is doing here, is seeking to use attorney's and attorneys' fees as a basis for prosecuting our clients, that we are taking the system and turning it – turning it on its head.

Uhm, what is – what is the first thing that a lawyer, if this Court is to permit this type of subpoena to take place, what is the first thing that a lawyer does? In essence, we have to, as Mr. Kamicas (?) says in his letter, *Mirandize* our client at the initial interview. Anything you provide me may and perhaps will be used against you.

And, uh, the clients are going to just get up and walk out of our offices. It's destroying the – the concept that we have all been schooled upon. And I understand that Your Honor's instincts, I believe, were in a similar vein when the Court ruled as it did.

I still feel, however, that in light of, uh, Judge Chasanow's decision, and in light of the fact that Judge Chasanow, a very keen observer of the scene, stayed away from [p. 1-8] the issue of what happens when we have a – have a representation of a present client. Uh, I would suggest to the Court that – that we are in a different status, and that we don't have a basis whatsoever for the qua – for the subpoena being issued.

Now, uh, we did raise in our memorandum the fact that – that Ms. Gutierrez' offices has been the subject of three subpoenas. I want the record to reflect that only two of those were from the Office of the Attorney General. The first one gave rise to the Chasanow matter, and the second one brings us here today. The third one, uh, uh, because the state's attorneys throughout the state are taking, uh, taking the lead of the Attorney General's Office, and they have now started to issue subpoenas in their cases, and that was the situation, uh, with reference to – to another matter with Ms. Gutierrez's firm.

So, if this is to permit – be permitted, uh, and it's my understanding, and – and perhaps Ms. Henneman can speak to this issue, that as a part of all of these criminal tax investigations, the pattern will now be in practice you bring in the lawyer, uh, and you get all the information pertaining to the fees.

Uh, now to some this not – may not strike a cord of concern. To those of us in the trenches every day, uh, when we are retained by counsel and develop the attorney-client [p. 1-9] relationship with these people, and then to be brought to court to provide information leading to the prosecution of these individuals, our system is – is not as it was, or – or should be. Thank you.

THE COURT: All right, Ms. Henneman?

MS. HENNEMAN: Your Honor, I'll be brief since as Mr. Joseph acknowledges, this matter has been visited with the Court previously and recently.

Mr. Joseph overstates, uh, his case when he argues that subpoenas such as this will erode the attorney/client privilege. He also overstates this case when he claims that the privilege covers information such as this, which he does not even contend is confidential or represents a confidential communication. All that the privilege protects is that which was confidential communication between the client and the attorney for the purpose of seeking and obtaining legal advice. Fee information just doesn't fall into that category.

Mr. Joseph doesn't contend that it does. What he seeks to do is urge the Court to extend the reach of the privilege beyond that which is confidential, and the privilege was never meant to reach that far.

Moreover, I can state categorically that the government is not basing its prospective prosecution of this target or any other target solely on the basis of the payment of legal fees. As explained in our papers, and as the Court well understands, [p. 1-10] because I'm sure

Your Honor has handled these matters, in a tax prosecution frequently the method of analysis is that of net worth, which means an analysis and an examination of all expenditures of the target.

The payment of money for attorney's fees and expenses is but one of many expenditures. Any and all expenditures will be and are being examined by the Grand Jury as always happens in any tax case. The fact that this particular target among his many expenditures had one to an attorney simply falls into all the other expenditures which the government and the Grand Jury will examine. It may be a link, but it certainly is not the last link or only link leading to his prosecution.

And finally, I want to emphasize that Judge Chasanow, in writing the opinion for the majority in the previous case, definitively held that the subpoenaed information was not privileged, and therefore the subpoena should not have been quashed. He did not, and the court did not base its decision on the fact that in that case it was former client that was involved, but instead went on at great length and at great pains to explain that they were basing their decision on the fact that fee information is not privileged. It is not a confidential communication. That reasoning applies whether a client is currently or formerly a client of the attorney.

And lastly, with respect to the specific issue of the attorney who has received the subpoena presently representing [p. 1-11] the client, uh, and indeed as Ms. Gutierrez has just testified, this was not known to me previously, she has sworn that she represents this target in connection with the very matter that the Grand Jury

that issued the subpoena is investigating. Be that as it may, the Fourth Circuit recently addressed that very same issue, dealt with the Sixth Amendment argument raised almost verbatim by Mr. Joseph, and rejected it, pointing out that in effect what that argument asks the Court to do is to find whenever the information sought would implicate the client, the Grand Jury can't have it. Well, that's not the law. The law is that the Grand Jury can't have that which is privileged, that which is confidential, not that which implicates the target. Thank you, Your Honor.

THE COURT: Okay.

MR. JOSEPH: Very briefly, Your Honor.

THE COURT: Mr. Joseph?

MR. JOSEPH: Uhm, obviously we – we do maintain that the communication that – that the fee is a communication is a confidential one. However, Judge Chasanow, uh, does not agree. Uh, thus, it would be silly for us to rehash a position contrary to that recently enunciated by the Court of Appeals.

Uh, what – what I do take issue with in terms of Ms. Henneman's analysis, is placing an attorney in the same – the same context as a B.M.W. or perhaps with some attorneys, a [p. 1-12] Volkswagen, uh, or – or a watch, a Rolex watch, uh, or an attorney, or an attorney's fees. There is a special relationship, we would suggest to the Court, between an attorney and his or her client, and I don't believe that the courts can just view it as another piece of property purchased by the client.

With, uh, reference to the Chasanow opinion, uhm, the Chasanow opinion does go to great pains to emphasize the fact that the – Mr. Murphy, in that case, was not counsel, was not – was no longer counsel for the defendant in that case. Thus, the court, I would respectfully submit, makes it clear that they are leaving for another day the issue of what happens when you have an even greater Sixth Amendment problem, and I believe that that is addressed.

And I don't believe that the Fourth Circuit, uh, uh, in holding that, uh, uh, Judge Motz in federal court did not have to entertain a hearing with reference to that particular case, uh, uh, in allowing the subpoena. I don't think that the Court of Appeals addressed the issue specifically as we have here where we have representation not only in the criminal case but also the forfeiture and also the very case that results in the subpoena from the Office of the Attorney General. That is a big difference, and I believe it's sufficient to form a basis for this Court quashing the subpoena.

[p. 1-13] THE COURT: Do you know of any case anywhere in the country where a distinction's been made between a former client and a current client?

MR. JOSEPH: In view of the answer, the direct answer is I don't have that case. I have not found such a case. However, it is only been –

THE COURT: Did you look? I mean, have you –

MR. JOSEPH: Yes, yes.

THE COURT: Yeah.

MR. JOSEPH: Uh –

THE COURT: I just didn't know whether there was any.

MR. JOSEPH: Yeah, I am not aware of a case where –

THE COURT: Okay.

MR. JOSEPH: – that distinction has been made. I am aware of – of the fact that only recently have we had the trend towards going after attorneys' fee records in this type of situation. I think –

THE COURT: What about from the reverse point of view, that the attorney's income is being investigated as an invasion of the attorney's privacy? Any cases like that?

MR. JOSEPH: Well, that would involve the attorney's right, I believe as well, to the Fifth Amendment, uh, to – to take the Fifth Amendment under those circumstances. Uh, Judge Bell addresses the issue as well where the [p. 1-14] attorney is viewed as part of a common scheme or plan, if I'm answering the Court's question, with the defendant. Uh, the – the courts have held that, uh, uh, if the – if there's no Fifth Amendment right – privilege asserted, then – then arguably, the subpoena would be permitted because there is some showing of a complicity between the attorney and – and the client. But here there's no suggestion of that and –

THE COURT: Well, I didn't mean in a complicity situation.

MR. JOSEPH: Oh, I – I understand.

THE COURT: I meant in a totally – just nobody has a right to know what my income is kind of approach.

MR. JOSEPH: Well, I – I think that certainly is an argument and, uh, uh, we're willing to permit the Court to rest its hat on whatever the Court deems appropriate.

THE COURT: Just curious.

MR. JOSEPH: Yes, thank you.

MS. HENNEMAN: Your Honor, I might just add that, uhm, my suggestion in my papers that there were mechanisms to avoid even the speculative, uh, conflict that Mr. Joseph conclusorily alleged but didn't substantiate, uh, such as having the bookkeeper for Ms. Gutierrez's firm come to the Grand Jury and produce the records, or even a stipulation as to, uh, what the amount, form and date of the payments were, uh, would be satisfactory and that would remove Counsel from [p. 1-15] even getting anywhere near a situation where he or she is conflicted in representing this –

THE COURT: Well, I don't think –

MS. HENNEMAN: – individual.

THE COURT: – the Defense Bar looks at it that simply, but, uh, I mean, that's a simple way of doing it, but they feel they have some kind of duty to protect which –

MS. HENNEMAN: And I – I understand that.

THE COURT: – is not all misplaced.

MS. HENNEMAN: I understand that, Your Honor. I used to be a defense attorney, and would probably feel similarly. However, I think it's important to sort of step back from the really highly charged emotional issue that – that this subpoena apparently raises and – and try to parse. But, what – it's the privilege that she's hanging her hat upon. And without denigrating the importance of that privilege, it's important to keep track of what it covers and what it doesn't cover. And once one compartmentalizes the information that way, then it should be easier, less uncomfortable, in ordering that that information be turned over. Thank you.

MR. JOSEPH: With – without belaboring it, I wouldn't be able to sleep if the record didn't make it clear that, uh, when my bookkeeper goes to the Grand Jury, it's no solace to my client that I say, hey, I'm not the one giving [p. 1-16] the information, it's my bookkeeper

THE COURT: I understand that.

MR. JOSEPH: My bookkeeper is me. And – and, uh, uh, Ms. Gutierrez reminds me that as part of our retainer agreements we may have to put hiring me could be hazardous to your health. It's, uh, there may be some –

THE COURT: Just stamp it on your forehead.

MR. JOSEPH: It – it – it – in an investigation that has been going on many months to say that well, this isn't the last link, uh, to – to think that they can come to court now without showing some basis whatsoever for needing this additional information, uhm, I think is stretching, uhm, stretching the law and even Chasanow's decision farther than it was meant to be.

THE COURT: All right. Well, I'm going to do a little research in this area, see if I can find anything. And if not then I'll give you a ruling quickly.

MR. JOSEPH: Thank you.

THE COURT: Okay.

MS. HENNEMAN: Thank you, Your Honor.

THE COURT: Mm-hmm.

(The proceeding then concluded at 1:58 p.m.)

* * *

[p. 1-17] CERTIFICATION

I HEREBY CERTIFY this 4th day of November, 1993, that the foregoing is at [sic] true and bona fide transcription of the proceedings in the case entitled *Special Investigation, Marie Cristine Gutierrez,* Case Number Miscellaneous 1/296X, as electronically recorded on the 5th day of October, 1993, in open court, in the Circuit Court for Anne Arundel County, Maryland.

/s/ Kathleen M. Higgins
Kathleen M. Higgins,
Court Reporter

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| IN RE: | * | IN THE |
| A | * | CIRCUIT COURT |
| SPECIAL INVESTIGATION | * | FOR |
| | * | ANNE ARUNDEL COUNTY |
| | * | Misc. 1/29X |
| | * | |

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MEMORANDUM OPINION AND ORDER

This is a motion to quash a subpoena duces tecum issued by the Grant Jury for Anne Arundel County to M. Christina Gutierrez, Esq. Ms. Gutierrez was summoned to appear before the Grand Jury and to produce any and all records reflecting payments made for legal services rendered to or on behalf of R.W.[1] for the time period January 1, 1990 to the present. The underlying circumstances which involve this subpoena is an investigation by the Office of Gutierrez's client. It has been conceded by the State that Ms. Gutierrez currently represents R.W. in ongoing criminal narcotics and civil forfeiture cases pending in Anne Arundel County Circuit Court and in other jurisdictions in this State.

This Court is well aware of the recent decision in *In Re Criminal Investigation No. 1/242Q*, 326 Md. 1 (1992) which held that compelling an attorney to disclose information about fees paid by former clients does not violate either the attorney-client privilege or the client's Fifth or Sixth Amendment rights. In reading the majority opinion

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[1] The name of the client has been kept confidential as required by the Maryland Rules. see Md. Rule 4-642 and 8-123.

this Court finds that the law as it relates to the disclosure of attorney's fees and as announced in *In Re Criminal Investigation No. 1/242Q* is limited to the former client situation. In making it's decision the Court of Appeals did not address the situation when a present client's fee information is sought by the state. Therefore, this Court finds that by implication the Court of Appeals did not extend the holding to situations involving present clients. This position is not without some basis. In the dissenting opinion Judge Bell noted that he "read the majority opinion as discouraging, rather than condoning, the subpoena of the fee information concerning present clients. *Id.* at 14 n.1.

In this Court's opinion this is an important distinction when dealing with the issue of whether an attorney could refuse to provide information related to the fees paid by a present client. The Court of Appeals recognized that the attorney-client privilege is necessary in order to assure that clients are not impeded in seeking legal advise or in confiding in their lawyers. *Id.* at 11. In this situation we have an individual who is facing serious criminal charges and the possible chilling effect such disclosure could have on his ability to openly seek his attorney's legal advise would be great. Moreover, the State has not shown any immediate need for the information sought nor have they shown whether any prejudice would occur should they not obtain the fee information at this point in time. For these reasons, and without holding that the attorney fee information of present clients is protected by the attorney-client privilege, this Court will stay the enforcement of the subpoena until Ms. Gutierrez's representation of her client has terminated. In this

way, the possible chilling effect that the summonsing of Ms. Gutierrez or her records before the grand jury has on her relationship with her client would be ameliorated.

WHEREFORE, it is this 8th day of October 1993 by the Circuit Court for Anne Arundel County.

ORDERED that the issuance of the subpoena duces tecum to M. Cristina Gutierrez be STAYED.

/s/ Bruce C. Williams,
Bruce C. Williams, Judge
[seal]

cc: Carolyn H. Henneman, Esq.
Fred R. Joseph, Esq.

TRUE COPY:
TEST: Mary McNally Rose, Clerk

By: IllegibleDeputy

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| IN RE: | * | IN THE |
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| A | * | CIRCUIT COURT |
| | * | |
| SPECIAL | * | FOR |
| INVESTIGATION | * | |
| | * | ANNE ARUNDEL COUNTY |
| | * | |
| | * | CASE NO. |
| | * | MISC 1-296X |
| | * | |

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ORDER

The State's Motion for Reconsideration and Opposition thereto having been read and considered, it is this 27th day of October 1993

ORDERED that the Motion for Reconsideration is DENIED. See *In Re Stewart*, 548 N.Y.S. 2d 679 (A.D. 1 Dept 1989).

/s/ Bruce C. Williams
BRUCE C. WILLIAMS

cc: Fred R. Joseph, Esquire
Carolyn H. Henneman, Esquire

**In re CRIMINAL INVESTIGATION NO. 1/296X IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY.**

**No. 130, Sept. Term, 1993.**

Court of Appeals of Maryland.

Aug. 25, 1994.

Attorney representing target of grand jury investigation moved to quash subpoena for records of attorney fees paid by target. The Circuit Court, Anne Arundel County, Bruce C. Williams, J., stayed enforcement of subpoena until attorney's representation of target ceased. State filed notice of appeal to Court of Special Appeals. Court of Appeals issued writ of certiorari. The Court of Appeals, Chasanow, J., held that: (1) records were not protected by attorney-client privilege, and (2) disclosure would not violate target's right to counsel.

Reversed and remanded.

Bell, J., filed dissenting opinion.

Carolyn H. Henneman, Asst. Atty. Gen. J. Joseph Curran, Jr., Atty. Gen., both on brief), Baltimore, for appellant.

Fred R. Joseph, Greenbelt, for appellee.

Argued before MURPHY, C.M., and ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, BELL and RAKER, JJ.

CHASANOW, Judge.

**This case involves the issue of whether an attorney may refuse to comply with a grand jury subpoena *duces***

*tecum* which seeks the records of the attorney's fees paid by a named current client.

I.

The Anne Arundel County Grand Jury has been conducting a criminal tax investigation of R.W.[1] since March, 1993. The investigation is part of the Attorney General's "narco-tax" program that targets known and suspected drug dealers for income tax investigation and, if warranted, prosecution. The investigation utilizes the "net worth" method of accounting to expose individuals who expend more than the incomes reported on their tax returns. During this inquiry, the grand jury issued a subpoena *duces tecum* to M. Cristina Gutierrez, a member of the Maryland bar. The subpoena requested records of the attorney's fees that R.W. paid to Gutierrez. Gutierrez initially was retained to represent R.W. in a narcotics case as well as state and federal forfeiture actions, all of which were pending when this investigation commenced. Apparently she also is representing R.W. in the tax investigation for which the subpoena was issued.

Gutierrez filed a motion to quash the subpoena in the Circuit Court for Anne Arundel County on the grounds that compelling an attorney to divulge fee information pertaining to a current client would violate the attorney-client privilege and the Sixth Amendment right to counsel. She also complained that releasing such information would result in a "chilling effect" on the relationship

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[1] The identity of the target of this investigation is withheld pursuant to Maryland Rule 8-123(c).

between counsel and her client. On October 8, 1993, Judge Bruce C. Williams issued a Memorandum Opinion and Order stay[ing] the enforcement of the subpoena until Ms. Gutierrez's representation of her client has terminated." Judge Williams based his decision, in part, on this potential "chilling effect" and its threat to the sanctity of the attorney-client relationship. The State filed a Motion for Reconsideration that was denied by the Circuit Court. Thereafter, the State filed a Notice of Appeal to the Court of Special Appeals. Prior to the intermediate appellate court's consideration of the case, we issued a writ of certiorari.

When the circuit court delayed the enforcement of the subpoena until the termination of Ms. Gutierrez's "representation of her client," the court in effect permanently denied enforcement of the subpoena because as long as the tax investigation continues it is reasonable to assume that Ms. Gutierrez's representation of R.W. also will continue. Therefore, the order denying enforcement of the subpoena was an appealable final order.

Although this is a case of first impression in Maryland, it is fundamentally an extension of our holding in *In re Criminal Investigation No. 1/242Q*, 326 Md. 1, 602 A.2d 1220 (1992). In that case, we held that information pertaining to fees paid by a *former* client who was the subject of a tax investigation was not protected. Gutierrez attempts to distinguish the instant case from *In re Criminal Investigation No. 1/242Q* on the grounds that R.W. is a current client rather than a former client.

## II.

## Attorney-Client Privilege

We fully recognize the importance of the attorney-client privilege and its close relationship with the constitutional rights pertaining to the effective assistance of counsel. As we said in *State v. Pratt*, 284 Md. 516, 398 A.2d 421 (1979),

> "[w]hile never given an explicit constitutional underpinning, the privilege is, nevertheless, closely tied to the federal, we well as *this State's*, constitutional guarantees of effective assistance of counsel and could, *if limited too severely*, make these basic guarantees virtually meaningless." (Emphasis added).

284 Md. at 520, 398 A.2d at 423.

Initially, it has been suggested that, prior to issuing a subpoena for an attorney's fee records, we should require the State to make a preliminary showing of necessity. No similar requirement exists for other grand jury subpoenas, and there is no reason why courts should create a pre-subpoena disclosure requirement for these records. In *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir.1985), *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986), the court stated the following:

> "To create new standards for obtaining fee information at the grand jury stage risks unacceptable interruption of the grand jury process and inevitable probing into what information the grand jury already has in order to determine whether a heightened "need" standard has been met. To allow a grand jury target to challenge

> the subpoena on the basis of a 'need' requirement would seriously jeopardize the secrecy of the proceeding and the grand jury's investigative functions."

781 F.2d at 248. We reject the suggestion that, prior to issuing a subpoena for attorney fee records, the State should make a preliminary showing of necessity.

In determining whether the fee information pertaining to a current client is protected by the attorney-client privilege, we should begin with our recent holding in *In re Criminal Investigation No. 1/242Q, supra.* In that case, the Anne Arundel County Grand Jury issued a subpoena *duces tecum* to William H. Murphy, Jr., Esquire, commanding him to reveal fee information regarding two former clients whom the grand jury was investigating for possible violations of Maryland tax law. Mr. Murphy moved to quash the subpoena on the basis that the information was privileged and confidential. The Circuit Court for Anne Arundel County granted Mr. Murphy's motion and the State appealed. This Court granted certiorari before the Court of Special Appeals addressed the question.

After explaining that the attorney-client privilege, and not the Rules of Professional Conduct, governs the disclosure of an attorney's fees, we proceeded to discuss whether the attorney-client privilege would shield Mr. Murphy from disclosing such information. We first recognized that "[t]he overwhelming weight of authority holds that the attorney-client privilege is generally not violated by requiring disclosure of the payment of attorney's fees and expenses." *In re Criminal Investigation No. 1/242Q,* 326 Md. at 7, 602 A.2d at 1222. *See, e.g., In re Osterhoudt,* 722 F.2d 591, 593 (9th Cir.1983); *In re Grand Jury Matter,* 926

F.2d 348, 351 (4th Cir.1991). We then discussed, without adopting, three exceptions to this general rule which have received varying degrees of support in the federal court system. *See In re Criminal Investigation No. 1/242Q*, 326 Md. at 7-10, 602 A.2d at 1223-24. We concluded that none of these exceptions was applicable to the facts of that case and therefore, even if we had adopted one or more of the exceptions, the grand jury could still compel disclosure of fees paid by a former client.

The "last link" exception, primarily used in situations where the information sought is the client's identity, was obviously inapplicable because Mr. Murphy's clients were known to the state. *See In re Criminal Investigation No. 1/242Q*, 8326 Md. at 8-9, 602 A.2d at 1223. Another exception, the "communication" exception, protects information that is considered " 'tantamount to a confidential professional communication.' " *In re Criminal Investigation No. 1/242Q*, 326 Md. at 9, 602 A.2d at 1224 (quoting *Tornay v. United States*, 840 F.2d 1424, 1428 (9th Cir.1988)). In *In re Criminal Investigation No. 1/242Q*, we offered two reasons why this exception would not apply. First, payment of a fee is a nonassertive act that is not intended to communicate information. Second, disclosure of the amount and method of the payment of a fee revealed nothing about the advice sought by the clients or given by the lawyer in that case, 326 Md. at 10, 602 A.2d at 1224. *See also United States v. Grand Jury Matter*, 789 F.Supp. 693, 696 (D.Md.1992) (Hargrove, J.) (applying similar reasoning).

The final exception that we considered was the "legal advice" exception. According to the Ninth Circuit, this exception applies where "disclosure of the information would implicate the client in the very matter for which

legal advice was sought in the first case." *In re Grand Jury Subpoenas Duces Tecum (Marger/Merenbach)*, 695 F.2d 363, 365 (9th Cir.1982). We determined that the exception did not apply in *In re Criminal Investigation No. 1/242Q*, because the clients did not retain Mr. Murphy for the tax investigation, and therefore the advice sought had nothing to do with the tax investigation.

In the instant case, Ms. Gutierrez does not claim privilege based on the "last link" or the "communication" exception. She does argue, however, that the "legal advice" exception should be adopted in the case at bar, and that this exception would protect the fee information which the State sought by subpoena.

The facts in *In re Criminal Investigation No. 1/242Q*, were quite similar to the facts in the instant case, and this Court held the attorney fee information was not privileged. The trial judge in the instant case sought to distinguish our prior holding on the basis that the attorney in our prior case no longer represented the target of the investigation, whereas in the instant case, she still does. The decision in *In re Criminal Investigation No. 1/242Q*, did involve a former client, but our holding was not based on that fact. The principle behind the attorney-client privilege – protecting confidential communications – applies to former and current clients. The attorney-client privilege does not cease with the termination of the relationship. In fact, the privilege is theoretically perpetual. *See* 1 *McCormick on Evidence* § 94, at 348 (John W. strong ed., 4th ed. 1992) ("The accepted theory is that the protection afforded by the privilege will in general survive the death of the client."); 5 Lynn McLain, *Maryland Evidence* § 503.14, at 495 (1987) (stating that the privilege applies

even after the attorney-client relationship has ended, "indeed, even after the client's death"). In *Harrison v. State*, 276 Md. 122, 345 A.2d 830 (1975), this Court reiterated that "confidential communications are not to be revealed at any period of time, either before or after the suit has been brought to an and, or in any other case; for, as to all such matter[s], his mouth is shut forever." 276 Md. at 132, 345 A.2d at 836 (internal quotation marks and attributions omitted) (emphasis omitted). Therefore, the attorney-client privilege extends beyond the duration of the relationship, rendering the distinction between former and current clients insignificant with respect to the privilege.

Gutierrez suggests that if the general rule is that the attorney-client privilege does not prevent disclosure of a present client's fee information, than "the Court of Appeals should adopt the 'legal advice' exception and hold that it is applicable to the instant case." The legal advice exception would protect fee information under the attorney-client privilege where, " 'disclosure of the information would implicate the client in the very matter for which legal advice was sought in the first case.' " *In re Criminal Investigation No. 1/242Q*, 326 Md. at 7, 602 A.2d at 1223 (quoting *In re Grand Jury Subpoena Duces Tecum (Marger/Merenbach)*, 695 F.2d at 365). A similar issue was decided by the Fourth Circuit in *In re Grand Jury Matter, supra*, where a grand jury requested fee records from attorneys whose client was under investigation for possible income tax violations. The attorneys were representing the client in connection with the income tax violations being investigated, and they claimed that they were excused from producing the documents because the fee

information would implicate the client in the same criminal activity for which he sought legal advice. The Fourth Circuit, however, held that the attorney-client privilege did not preclude the attorneys from producing the fee documents. Judge Murnaghan, writing for the three judge panel, discussed and then rejected the legal advice exception. He explained as follows:

> "[The attorneys] argue for the application of an exception that recognizes a privilege ' "where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought." ' [*United States v.] (Under Seal)*, 774 F.2d [624,] 628 [(4th Cir.1985), *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1514, 89 L.Ed.2d 913 (1986)] (quoting *United States v. Hodge and Zweig*, 548 F.2d 1347, 1353 (9th Cir.1977)). Whatever label the attorneys give to their supposed exception, it involves recognizing a privilege for information implicating the client, regardless of whether it is a confidential communication. Such a privilege receives little support from current case law.
>
> The attorneys have suggested that although *United States v. Ricks*, 776 F.2d 455 (4th Cir.1985), questioned the validity of the exception, nonetheless, the Fourth Circuit intends to apply it. We disagree. In *Ricks*, Chief Judge Harrison L. Winter recognized that *Hodge & Zweig*, the case giving rise to the 'exception,' 'may no longer be good law in the Ninth Circuit. *See In re Osterhoudt*, 722 F.2d 591, 593 (9th Cir.1983). Certainly its purported teaching has been rejected

> by other circuits.' 776 F.2d at 465 (citing decisions by the Second, Sixth, Seventh, and Eleventh Circuits).
>
> The attorney-client privilege protects only confidential communications. 'Fee arrangements usually fall outside the scope of the privilege because such information ordinarily reveals no confidential professional communication between attorney and client, and not because such information may not be incriminating.' *In re Osterhoudt*, 722 F.2d at 593; *See Ricks*, 776 F.2d at 465. An exception such as the one suggested by the attorneys rests on an unconvincing rationale." (Footnote omitted).

*In re Grand Jury Matter*, 926 F.2d at 352. The legal advise exception has been expressly rejected by many courts. *See, e.g., In re Grand Jury Subpoenas*, 803 F.2d 493, 497 (9th Cir.1986) ("It is not the law that the requisites of the attorney-client privilege are met whenever evidence regarding the fees paid the attorney would implicate the client in a criminal offense regarding which the client sought the attorney's legal advise."), *corrected*, 817 F.2d 64 (9th Cir.1987); *United States v. Ricks*, 776 F.2d 455, 465 (4th Cir.1985) (discussing the legal advise exception and noting that "its purported teaching has been rejected by other circuits"); *In re Osterhoudt*, 722 F.2d at 592-93. We decline to adopt it as an exception to the general rule that attorney fee information is not privileged – especially under the circumstances of the instant case.

Gutierrez was retained to represent R.W. in drug and forfeiture cases. The fees in these cases are relevant only to the separate and distinct tax investigation, and their records would not fall within the legal advise exception.

By retaining Gutierrez in the tax investigation, R.W. should not thereby be able to preclude her from furnishing relevant and probative information to the grand jury about fees in other unrelated cases. As to any fee R.W. may have paid to Gutierrez for representing him in the tax investigation, that information also should not be privileged.[2] R.W. knew that he was the subject of a net worth tax investigation when he paid the fee to Gutierrez. The attorney-client privilege "is not generally viewed as affording the attorney license to withhold evidence from the judicial system." 1 *McCormick on Evidence* § 89, at 328 n. 12. We decline to expand the attorney-client privilege by creating an exception which would allow concealment of attorney fee records which are relevant to a net worth investigation. Since we decline to apply the legal advice exception in the instant case, we are left with the general rule adopted in *In re Criminal Investigation No. 1/242Q* that the attorney-client privilege does not preclude an attorney from furnishing fee records to a grand jury conducting an income tax investigation.

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[2] It is questionable whether the State is seeking records of fees paid to Gutierrez for her representation of R.W. in connection with the grand jury investigation. In its response in opposition to the motion to quash the subpoena *duces tecum*, the State indicated that "[i]n this case, of course, Respondent's representation of R.W. is in connection with a *different* case than the one under investigation by the Grand Jury issuing the subpoena. As a result, Respondent cannot even claim . . . that the information sought would implicate the client in the very criminal activity for which her legal advice was sought." (Emphasis in original).

## III.

### Sixth Amendment Right to Counsel

Gutierrez next asserts that compelling an attorney to reveal fee information pertaining to a current client will violate the client's constitutional right to counsel. She claims that, if she is compelled to disclose the fee information, a conflict will result between her and her client. According to Ms. Gutierrez, this conflict might eventually lead to her disqualification as the attorney in the matter, and hence violate the client's Sixth Amendment right to the counsel of his choice. We begin our analysis by noting that there is no Sixth Amendment right to counsel during a criminal investigation, even if the person being investigated has retained counsel. *See Moran v. Burbine*, 475 U.S. 412, 430-31, 106 S.Ct. 1135, 1145-46, 89 L.Ed.2d 410, 427 (1986). As the United States Supreme Court observed in *Moran v. Burbine*,

> "[t]he Sixth Amendment's intended function is not to wrap a protective cloak around the attorney-client relationship for its own sake. . . . Its purpose, rather, is to assure that in any 'criminal prosectutio[n],' U.S. Const., Amdt. 6, the accused shall not be left to his own devices in facing the ' "prosecutorial forces of organized society." ' *Maine v. Moulton*, [474 U.S. 159, 170, 106 S.Ct. 477, 484, 88 L.Ed.2d 481, 492 (1986)] (quoting *Kirby v. Illinois*, [406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411, 418 (1972)]). By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation."

475 U.S. at 430, 106 S.Ct. at 1145-46, 89 L.Ed.2d at 427. *See also McNeil v. Wisconsin*, 501 U.S. 171, 174, 111 S.Ct. 2204,

2207, 115 L.Ed.2d 158, 166-67 (1991); *In re Criminal Investigation No. 1/242Q*, 326 Md. at 12, 602 A.2d at 1225. We are unwilling to find a denial of the right to counsel at the investigative stage when there is no right to counsel at that stage. Therefore, because the grand jury is only *investigating* R.W., a Sixth Amendment violation should not result from compelling Ms. Gutierrez to disclose fee information to the grand jury.

Additionally, Gutierrez asserts that providing the grand jury with the fee information would violate her duty of loyalty to her client. Again we turn to *In re Criminal Investigation No. 1/242Q* to resolve this contention. In that case, we determined that disclosure of fee information would violate the Sixth Amendment *only if* it created an *actual conflict* between the client and the attorney, 326 Md. at 12-13, 602 A.2d at 1225-26. *See also In re Grand Jury Matter*, 926 F.2d at 351; *In re Grand Jury Subpoena for Reyes-Requena*, 913 F.2d 1118, 1129-30 (5th Cir. 1990), *cert. denied*, 499 U.S. 959, 111 S.Ct. 1581, 113 L.Ed.2d 646 (1991). The mere possibility, however, that a conflict might arise from compliance with the subpoena is not enough to overcome the " ' "obligation of every person to appear and give his evidence before the grand jury." ' " *In re Criminal Investigation No. 1/242Q*, 326 Md. at 12, 602 A.2d at 1225 (quoting *In re Grand Jury Subpoena for Reyes-Requena*, 913 F.2d at 1130, in turn quoting *United States v. Dionisio*, 410 U.S. 1, 9-10, 93 S.Ct. 764, 769, 35 L.Ed.2d 67, 77 (1973)). In the case at bar, Ms. Gutierrez has not been placed in actual conflict with her client.

Another reason Gutierrez suggests that disclosing attorney fees could lead to a Sixth Amendment violation is that, if she furnishes incriminating information, she

could be compelled to testify against her client at trial, and this could result in her disqualification as his attorney. *Cf. United States v. (Under Seal)*, 774 F.2d 624, 627-28 (4th Cir.1985) *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1514, 89 L.Ed.2d 913 (1986). The State, however, argues that it is unlikely that Gutierrez will ever have to testify against her client.[3] Even if we assume that the Sixth Amendment would preclude the prosecution from calling Gutierrez as a witness at trial, the prosecutor has offered various alternative methods for providing the fee information such as using stipulations or by having a bookkeeper authenticate the records. By using these methods, the fee information could be reasonably provided at trial without requiring Gutierrez's testimony or disqualification as counsel. These alternatives have been endorsed by courts. *See In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d at 245 & n. 2; *United States v. (Under Seal)*, 774 F.2d at 628. For instance, in *In re Grand Jury Matter, supra*, the court said the following:

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[3] The State observes that before Ms. Gutierrez might be required to testify, R.W. would have to be indicted, plead not guilty, proceed to trial, and Ms. Gutierrez would have to be subpoenaed. At least one court has made a similar observation. *See In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 245 (2d Cir.1985) ("Before disqualification can even be contemplated, the attorney's testimony must incriminate his client; the grand jury must indict; the government must go forward with the prosecution of the indictment; and ultimately, the attorney must be advised that he will be called as a trial witness against his client. As a court, we decline to speculate that all those events will occur."), *cert. denied*, 475 U.S. 1108, 106 S.Ct. 1515, 89 L.Ed.2d 914 (1986).

> "Quashing of a subpoena [to an attorney for a current client's fee information] on sixth amendment grounds requires that the prospective disqualification of the attorneys not be merely speculative. Merely speculative disqualification is shown when the material can be presented so as to avoid disqualification. In the present case, the government suggested various ways in which the disclosure could be made without requiring disqualification of the attorneys. Those methods appear reasonable and viable. As construed by the district court and the government, the subpoena only requested documents relating to fee arrangements. Compliance would not have required attorney disqualification." (Citation omitted).

926 F.2d at 351. *See also United States v. Grand Jury Matter,* 789 F.Supp. at 695 (Hargrove, J.) ("In the case at bar, no actual conflict exists. The attorney can avoid acting as a witness, and thus avoid disqualification in this case, by exercising one of many options available in providing the requested information. [The attorney] could provide the requested information through a records custodian from his law firm, bookkeeper or any other person capable of admitting the records as a custodian of records, or by stipulation."). It is perhaps noteworthy that Rule 3.7 of the Rules of Professional Conduct permits an attorney to testify and still represent a client at trial in four instances, including when the testimony relates to the nature and value of legal services rendered in the case. *See* Maryland Rule of Professional Conduct 3.7(a)(2). We find that compelling Gutierrez to furnish the grand jury with records of R.W.'s fee payments would not violate his constitutional right to counsel.

## IV.

### Possible Chilling Effect

Without attributing the holding to any particular constitutional protection or privilege, the court below based its stay, in part, on the "possible chilling effect" enforcement of the subpoena "could have" on the attorney-client relationship. In her brief and argument before this Court, Gutierrez expands on the trial court's holding and suggests that, even if the fee information is not privileged and supplying fee records would not directly violate R.W.'s constitutional right to counsel, we still should not require disclosure. She reasons that because of the chilling effect on the attorney-client relationship, the client's resultant loss of trust in the attorney, and the attorney's duty of loyalty to a client, an attorney should not be required to furnish potentially damaging fee information about a current client. In a slightly different context, the Supreme Court stated that "counsel's duty of loyalty and his 'over-arching duty to advocate the defendant's cause' . . . is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth." *Nix v. Whiteside*, 475 U.S. 157, 166, 106 S.Ct. 988, 994, 89 L.Ed.2d 123, 134 (1986) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984)).[4] An attorney's disclosure of potentially incriminating fee records may have some chilling effect on the

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[4] *Nix v. Whiteside*, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) held that the Sixth Amendment right to assistance of counsel is not violated when an attorney refuses to cooperate with the client in presenting perjured testimony in the client's criminal trial.

attorney-client relationship, but that potential consequence alone will not justify refusal to comply with a lawful grand jury subpoena for non-privileged information. An attorney's refusal to call, at the request of a client, witnesses who will perjure themselves may also have a chilling effect on the attorney-client relationship, but an attorney's obligation to obey the law transcends the need to maintain a client's good will. *See e.g., Nix, supra.* The grand jury's authority to require production of testimony and documents is limited only by a valid privilege established under the common law, statutes, or the Constitution. *See United States v. Calandra,* 414 U.S. 338, 346, 94 S.Ct. 613, 619, 38 L.Ed.2d 561, 570 (1974); *United States v. Dionisio,* 410 U.S. 1, 9-10, 93 S.Ct. 764, 769, 35 L.Ed.2d 67, 76-77 (1973). Since production of the attorney fee information does not violate the attorney-client privilege or the Sixth Amendment right to counsel, we decline to preclude grand jury access to relevant information based solely on counsel's duty of loyalty or a chilling effect on the attorney-client relationship.

By requiring attorneys to disclose fee information, it is doubtful that we will significantly deter criminal defendants from retaining counsel. As one author noted:

> "If the individual already is known to the prosecution, the incentives to obtain counsel are going to be extremely strong. Few targets of grand jury investigations are likely to forego counsel simply out of fear that the prosecution will try to ascertain how much they are paying in legal fees. Even those who conclude that such information could be used as evidence of tax evasion or unexplained wealth indicative of other criminality are not likely to renounce legal

counsel entirely. They may purchase less expensive legal advise and, in that sense, be deprived of counsel of their choice. But the right to counsel does not include the right to hire any lawyer at any price without any risk. The Supreme Court has upheld against Sixth Amendment attack fee forfeiture provisions that constitute a far more significant intrusion on a defendant's ability to hire counsel of choice.

* * *

For three reasons, I am not persuaded that this cost is terribly high. First, my guess is that given the option, most people will seek out the best available counsel and take their chances that fee arrangements will be disclosed. Second, although I place a premium on guaranteeing the right to obtain *adequate* legal counsel, I do not believe there is a corresponding right to obtain the best counsel money can buy. Finally, even if information concerning fee arrangements is disclosed, it is likely to be but one piece of incriminating evidence. Evidence of the client's overall lifestyle, including the value of his house, car, and personal effects, [is] likely to be more incriminating. In relatively few cases is the client likely to anticipate that the amount of money spent on legal services will prove crucial to the prosecution's case. Therefore, I believe that relatively few potential clients who are already known to the prosecution will be deterred entirely from seeking legal advice and that the cost associated with the decision by some to reduce their consumption of legal advice is low. With regard to those persons already known to the prosecution, the balance of costs and benefits thus weighs heavily in

> favor of disclosure of fee arrangement information." (Footnotes omitted) (Emphasis in original).

Steven Goode, *Identity, Fees, and the Attorney-Client Privilege*, 59 Geo.Wash.L.Rev. 307, 349-50 (1991). Any "chilling effect" from requiring attorneys to disclose fee information would not justify extending the attorney-client privilege to permit the concealment of large expenditures which may be probative evidence of tax evasion by people suspected of being major drug dealers.

*JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY THE APPELLEE.*

BELL, J., dissents.

BELL, Judge, dissenting.

Like the majority opinion, this dissenting opinion is merely an extension of my dissenting opinion in *In Re Criminal Investigation No. 1/242Q* 326 Md. 1, 13, 602 A.2d 1220, 1226 (1992), with the exception of the observation that, "I told you so."

I dissent.